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House of Representatives

The House was not in session today. Its next meeting will be held on Monday, April 3, 1995, at 12:30 p.m.

Senate

FRIDAY, MARCH 31, 1995

(Legislative day of Monday, March 27, 1995)

The Senate met at 9:30 a.m., on the expiration of the recess, and was called to order by the President pro tempore [Mr. THURMOND].

PRAYER

The Chaplain, Dr. Lloyd John Ogilvie, offered the following prayer:

Let us pray:

Almighty God, our refuge and our strength, a very present help in trouble, You have made this Senate a family in which we not only work together to lead this Nation, but also share with each other the joys and sorrows of life. In times of tragedies and loss, we stand with each other. When one suffers pain or grief, we all feel it acutely.

This morning we reach out with love and empathy to our colleague and friend, Senator ROD GRAMS, as he endures the excruciating grief over the death of his infant grandson, Blake Eugene.

Comfort and encourage the mother. Give her Your strength and peace. Help her to trust You to sustain her through the anguish she is experiencing.

We ask You to give to Senator GRAMS the grace and wisdom he will need to lead his family through this troubled time. Free him from the ''why?'' questions for which there seem to be no answers, to receive the sure answer of Your healing presence. You do not will or cause the untimely death of a child, but You do give us strength to believe that death has been conquered and Blake Eugene is among the cherubim of Heaven.

And now we commit to You the work of this day. Draw us into deeper friendship with You and each other. In the name of Him who gives us eternal life. Amen.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The acting majority leader is recognized.

Mr. LOTT. Thank you, Mr. President.

SCHEDULE

Mr. LOTT. Mr. President, this morning the time for the two leaders has been reserved. And there will now be a period for morning business not to extend beyond the hour of 10 a.m. with Senators permitted to speak for up to 5 minutes each.

At the hour of 10 o'clock the Senate will resume consideration of H.R. 1158, the supplemental appropriations bill. At that time, the pending amendment offered by Senator D'AMATO will be set aside so that Senator DASCHLE may offer an amendment.

Therefore, all Senators should be aware that rollcall votes are expected throughout the day. If there is a change in that, or if we get some time agreement on when votes might occur, certainly we will notify the Members expeditiously.

Mr. President, I yield the floor.

MORNING BUSINESS

The PRESIDENT pro tempore. Under the previous order, there will now be a period for the transaction of morning business not to extend beyond the hour of 10 a.m. with Senators permitted to speak therein for up to 5 minutes each.

Mr. EXON addressed the Chair.

The PRESIDING OFFICER (Mr. THOMAS). The Senator from Nebraska is recognized.

Mr. EXON. Mr. President, I believe the Senator from Nebraska has been allotted 5 minutes of morning business. Is that correct?

The PRESIDING OFFICER. Yes.

AN AMENDMENT ON ABORTION AND STATES RIGHTS

Mr. EXON. Mr. President, I rise today to introduce an amendment which I will formally introduce later on today or next week depending on flow of the business in the Senate. I filed the amendment at the desk. I will call it up later on during the consideration of the matters after we resume at 10 o'clock today per order of the Chair.

Mr. President, I rise today to introduce an amendment which is intended to clarify Federal law regarding Federal funding for abortion. Essentially, this is a States rights issue. As my colleagues know, the Hyde amendment has long been in place to restrict the use of Federal funds to pay for abortions under Medicaid. Originally, the only exception was for when the life of the mother would be endangered if the fetus were carried to term. Congress passed a modification, one I had long supported, effective October 1, 1993,

● This "bullet" symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

which expanded the exception to pregnancies that were the result of acts of rape or incest. I believe that it was the intent of Congress that that modification be permissive and not mandatory on the States.

The administration responded to the change in the Hyde amendment by issuing a directive dated December 28, 1993, sent to all of the States mandating that they pay for abortions resulting from rape and incest as well as involving the life of the mother. The administration, in my opinion, used a strained analysis to create such a mandate. It stretched the medically necessary justification covering the life of the mother to cover rape and incest, citing what it thought was congressional intent.

The issue of payment for abortions to save the life of the mother has been basically settled. The issue of payment for abortion for rape and incest or other reasons has not. Numerous States are in the midst of that debate now. Prior to the administration's Medicaid directive, most States prohibited the use of public funds for abortion with the only exception being for the life of the mother, and that includes my home State of Nebraska. Only a handful of other States already paid for abortions that were the result of rape and incest. Now several States are under the threat of losing their Medicaid funding because they are balking at complying with the Federal directive. States have been forced into the position of implementing the directive, often in direct contradiction of their State law, or risk losing much-needed Medicaid funding or carry the argument into court.

My amendment will give the States the option of using Federal funds for abortion in cases of rape and incest but will not mandate it as the administration and courts are doing as a result of a questionable interpretation of congressional intent.

This language was adopted on this bill in full committee in the House, but was jettisoned by the Rules Committee. As we know, there is no comparable committee in the Senate, and any Senator has the right to generally bring any amendment on this floor. As a result, I offer this amendment which I believe will clarify the intent of Congress in this matter. This is also a matter of fundamental States rights and the debate should not be preempted by a Federal directive.

Finally, here is an appropriate opportunity to clarify and limit the scope of a Federal mandate and to respect the role of States and their law.

No lengthy debate is necessary. The issue is simple and straightforward. We make no changes in Federal law requiring States to fund abortions under Medicaid when the life of the mother is endangered. We would allow the States, at their discretion, to not fund abortions for rape and incest.

At a proper time I will call up the amendment and urge its adoption.

In addition, let me briefly say in the closing time allotted to me, Mr. President, that at a time when we are hailing the fact that very recently we eliminated by an overwhelming vote in the U.S. Senate and in the House of Representatives the matter of mandates to the States, here is a clear case where we can put our votes where our voices have been in the past. Certainly, we all know that the States pay about 46 percent of all the Medicaid bills. It seems to me that this is a clear case that, if we are against mandates, if we are against continued funding required by the States without full compensation as a result of those laws by the Federal Government, that this is a case where I think we should return to what I believe was the intent of the Congress when we expanded the formally known Hyde amendment to allow States—but not directing them—to fund through Medicaid cases of rape and incest.

I think that was a very important step in the right direction when they provided that, as I have long held. But it seems to me that the administration in this case has misinterpreted a principle, a principle which I thought was very appropriate.

I reserve the remainder of my time, and I thank the Chair.

Mr. THURMOND addressed the Chair.

The ACTING PRESIDENT pro tempore. The Senator from South Carolina.

Mr. THURMOND. Mr. President, I wish first to commend the able Senator from Nebraska for the fine statement he has just made. We have to realize that under the Constitution States do have rights. The Federal Government has only the authority which has been delegated to it in the Constitution. States have the balance of the rights, and we must not forget that.

Mr. HATCH. Mr. President, I rise in support of the Exon amendment. Let there be no mistake. This is not a narrow question about whether abortions in the case of rape or incest should be funded under Medicaid. This is instead a question whether the Clinton administration will succeed in a clever but dishonest stealth campaign to override State restrictions on abortion funding and to require Americans to fund abortion on demand. That is what is at stake here. Anyone who says otherwise either doesn't understand the issue or is trying to pull the wool over the eyes of the American people.

Mr. President, let me explain in some detail the mischief that the Clinton administration has engaged in for the last year and a half or so with respect to the issue of Medicaid funding of abortion. Remember, this is an administration that claims that it wants abortion to be rare.

In 1993, both Houses of Congress, by impressive margins, passed into law an expanded version of the Hyde amendment.

This Hyde amendment forbids Federal taxpayer funding of abortion through Medicaid except in cases of rape, incest, or danger to the life of the mother. The very purpose of the Hyde amendment was to respect and accommodate the decisions by 40 or so States to restrict taxpayer funding of abortion.

No one in Congress intended that the Hyde amendment would become a vehicle for overriding State restrictions on abortion funding. But this is exactly the campaign that the Clinton administration, through the actions of its bureaucrats in the Department of Health and Human Services, has waged over the past 18 months. In State after State, the Clinton administration, in concert with pro-abortion groups, has attempted to override State restrictions on abortion funding and to require State taxpayers to fund abortion on demand.

Take, for example, what has happened in my State of Utah. On December 28, 1993, a Clinton administration bureaucrat sent a form letter to the State of Utah's Medicaid Director claiming that the Hyde amendment required Utah to fund abortions in instances where Utah law prohibited funding. In a response dated January 13, 1994, Mr. Rod Betit, the executive director of the Utah Department of Health, complained about the ''unconscionable catch–22'' that HHS was putting Utah and other States in. Mr. Betit pointed out, among other things, that the HHS pronouncement ''ignored longstanding principles of cooperation and consultation,'' adopted ''a questionable mandatory interpretation of previously permissive language,'' and ''issue[d] reporting and documentation requirements that have no basis in Federal law.''

Mr. President, I ask unanimous consent that the full text of Mr. Betit's letter be printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

UTAH DEPARTMENT OF HEALTH,
Salt Lake City, January 13, 1994.

Mr. BRUCE C. VLADECK,
Administrator, Health Care Financing Administration, Washington, DC.

DEAR BRUCE: I appreciate your taking the time to explain Sally Richardson's December 28, 1993 letter during our recent phone conversations. Your assurances that HCFA intends to follow the compliance process with regard to the new abortion mandate in an orderly, nonconfrontational manner is welcome. Nonetheless, I hope that after considering the points in this letter you will agree the prudent course of action would be for HCFA to rescind Sally Richardson's order, and reissue it as an optional policy change after appropriate consultation with the State Medicaid Directors in the form of a true Executive Order.

I share Ray Hanley's concerns about how this policy was announced. HCFA's method of issuing their interpretation of the 1993 Hyde Amendment ignored long standing principles of cooperation and consultation between HCFA and the states and threatens to seriously undermine this cooperative relationship. Not only did HCFA assume the responsibility to issue a questionable mandatory interpretation of previously permissive language, HCFA also took upon itself to

issue reporting and documentation requirements that have no basis in federal law. Further, HCFA completely ignored the box that this preemptive mandate immediately created for Utah and many other states. While HCFA has agreed to give the states time to resolve the dispute, your mandate has left the states vulnerable to legal action from other parties. Why HCFA would knowingly place states in this unconscionable catch-22, completely escapes me and leaders in other states.

Based on research to this point and careful consultation with local and national legal advisors, I continue to believe that HCFA's interpretation of congressional intent may be unsound. The Supreme Court has not decided this issue, having explicitly reserved judgment in *William v. Zbaraz,* 448 U.S. 358, 363 n.5 (1980). The Court has indicated that the intent to mandate abortion coverage should not be presumed, absent clear proof of that intent. *Beal v. Doe*, 432 U.S. 438, 446–47 (1977). Contrary to popular belief, passage of a new federal law does not in and of itself trigger federal supremacy. There has to be clear evidence that Congress intended to override the laws of the 50 states. Sally Richardson's letter indicates that HCFA's interpretation regarding medical necessity is ''(b)ased on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest.'' Your assistance in providing specific information to support this assertion is respectfully requested as Utah cannot locate any evidence to support Sally Richardson's claim.

In fact, I have reviewed the language of the Hyde Amendment for each year from 1976 through 1993. I see nothing distinctive about the 1993 language that addresses congressional intent to change a permissive policy to a mandatory one. The State Medicaid Manual indicates that the States ''may choose not to fund abortions to the extent they deem appropriate.'' *State Medicaid Manual*, Part 4, Section 4430. This has been federal policy from 1981 through 1992. I fail to see anything in the language of the 1993 version that dictates a change in that policy.

Further, I have reviewed the legislative history surrounding the adoption of the 1993 version of Hyde and find nothing conclusive there either. Comments from congressional leaders and their staff in the last 2 weeks would also suggest that no clear proof of intent exists. I am therefore persuaded that a permissive interpretation remains consistent with congressional intent. I also fail to see how that interpretation frustrates national policy in the Medicaid program.

Your January 5, 1994 letter to Ray Hanley argues that the absence of Bauman Amendment language since 1983 forces a mandatory interpretation. If this is so, why has the permissive language in the State Medicaid Manual remained unchanged? Further, your interpretation that the Hyde language preempts state law absent an express exception, is in direct conflict with the standard set forth by the Supreme Court in *Beal*. Have you any case law to support this position?

The legislative history surrounding the adoption of the Bauman Amendment in 1981 makes it very clear that it was intended to clarify congressional intent that abortion coverage was permissive. Our research to date, has not uncovered any explicit indication of why it is absent after 1983. Your conclusion that its absence automatically compels an interpretation that coverage is mandatory is highly suspect. It can be plausibly argued, and case law supports the interpretation in appropriate cases, that the failure to repeat such language does not appear after 1983, we would appreciate your assistance in resolving this important question.

As I indicated to you on the phone, and as the media has publicized, the Utah Department of Health is clearly caught between HCFA's mandate and very explicit state statutes. Utah Code Ann. §26–18–4(2)(1989) limits coverage to causes where the mother's life is threatened. Violation of this restriction by a public employee is a Class B misdemeanor and could include forfeiture of office. Utah Code Ann. §26–18–5(3)(1989) anticipates situations where changes in federal law mandate modifications to state law and rule. However, the last clause in this statute says ''providing, the provisions of this section shall not apply to department rules governing abortion.'' I believe the Utah Legislature has clearly indicated that a change, such as coverage for rape and incest related abortion, can only be made after public debate and a decision by that body. This is especially true in this case, where our legal analysis indicates that federal preemption of state law is ambiguous.

Your response to the issues raised in this letter will be very helpful to our Legislature. Our session begins on Monday, January 17, 1994 and runs through March 2, 1994. I am sure that this issue will be discussed. We would like to be able to share your response as part of that discussion.

I look forward to hearing from you as soon as possible.

Sincerely,

ROD L. BETIT,
Executive Director.

Mr. HATCH. The State of Utah, to its credit and to the credit of its fine Governor, Mike Leavitt, has refused to acquiesce in the Clinton administration's bureaucratic abuses. Predictably, the Clinton administration has even threatened to cut off Utah's participation in Medicaid unless Utah violates its own laws restricting abortion funding. On December 28, 1994, an HHS bureaucrat cited Utah for supposed noncompliance with Medicaid requirements.

Another key component of the administration's stealth campaign to require taxpayer funding of abortion on demand has been to work hand-in-hand with pro-abortion groups to file lawsuits against States that continued to enforce their restrictions on abortion funding. In January of this year, a pro-abortion group sued to void Utah's restrictions on abortion funding. Similar lawsuits have already succeeded in a number of other States.

Mr. President, Congress did not intend through the Hyde amendment to override State restrictions on abortion funding. Yet the administration has been using the Hyde amendment in pursuit of its agenda of funding abortion on demand. The administration's arguments have, admittedly, been clever. Clever but mischievous. Clever but dishonest. Clever but unfaithful to the clear intent of Congress. Clever but contemptuous of the right of the people in each State to determine whether and when to fund abortion.

To my colleagues, I say that the question on the Exon amendment is clear. If you believe that a policy of requiring States to fund abortion on demand should be imposed by stealth, then vote with the Clinton administration and against the Exon amendment. But if you believe that the rights of State taxpayers and the clear intent of Congress in passing the Hyde amendment should be respected, then join Senator EXON and me and others in voting for his amendment.

I commend the distinguished Senator from Nebraska for this amendment. It is a good amendment. He is a good man. He is doing what is right here, and I support him. I hope that the Clinton administration will back off and realize that the Senator from Nebraska is right.

I yield the floor.

Mr. THURMOND. Mr. President, I rise today to address the future of the Anti-Ballistic Missile Treaty of 1972 and its impact on U.S. national security. In my view, the administration's policy toward the ABM Treaty is fundamentally flawed and should be reconsidered. By seeking to perpetuate and expand the coverage of a treaty that is fundamentally outdated, the administration has created a number of problems. Let me briefly discuss these and offer an alternative approach.

The ABM Treaty was intended to be the central feature of an arms control regime that would balance and stabilize the United States-Soviet strategic relationship. This agreement, as much as anything else, symbolizes the cold war doctrine of mutual assured destruction, or MAD—a belief that if the United States and the Soviet Union remain equally vulnerable to massive nuclear retaliation, neither side will have an incentive to attack the other.

Today the cold war is over. And while the United States and Russia still differ over a variety of issues, there is no reason to perpetuate an adversarial relationship. Unfortunately, many government officials in Russia and the United States continue to cling to fundamentally outdated, cold war attitudes and policies.

The way the administration has handled the ABM Treaty is a glaring illustration of this problem. Rather than seeking to define a new United States-Russian strategic relationship, the administration has decided to reaffirm a relationship based on mutual vulnerability and the threat of retaliation.

Instead of seeking to replace or evolve the ABM Treaty regime, the administration is committed to preserving and even expanding the core principles of the ABM Treaty. It has sought to extend the philosophy of mutual vulnerability in two ways—by agreeing to multilateralize the treaty, and by attempting to extend its limitations to theater missile defense systems, which the treaty does not cover.

By multilateralizing the ABM Treaty, the United States is not only endorsing the continuation of mutual vulnerability, but is also inserting this concept into its relationship with several of the New Independent States of the former Soviet Union. Moreover, by including these countries in the ABM Treaty, we would give them a significant voice in, if not a veto over, key U.S. decisions on missile defense.

This is even more troubling when viewed in the context of what the administration is doing to capture theater missile defense systems under the ABM Treaty. The administration has shown a willingness, if not an eagerness, to include detailed performance limitations on theater missile defense systems. Under the guise of clarification, the administration has come up with nothing short of a new treaty regulating theater missile defenses.

The administration's overall approach to the ABM Treaty poses three overlapping problems, which might be viewed as near-term, mid-term, and long-term problems. Let me address each of these in turn and offer what I believe to be logical and achievable solutions.

In the near-term, the United States must respond to an expanding array of theater ballistic missile threats by developing and deploying highly effective theater missile defenses. These threats are an undeniable and salient part of the new security environment. Thanks to the efforts of U.S. industry and our military services, we are well positioned to acquire highly effective theater missile defenses and to allow these capabilities to grow along with the threat.

Unfortunately, the administration's current approach threatens to preclude promising theater missile defense options and establish an artificial technological ceiling on the growth of those systems that we do deploy. This approach is strategically unwise and legally unnecessary.

The solution to this problem is relatively straightforward. The ABM Treaty simply states that non-ABM systems may not be given capabilities to counter strategic ballistic missiles and may not be tested in an ABM mode. Nothing in the treaty talks about the performance of non-ABM systems and it would be very unwise for us to get into the business of regulating these systems now.

The answer is simply to define what a strategic ballistic missile is and to establish as a matter of U.S. policy or law that theater missile defense systems comply with the ABM Treaty unless they are actually tested against a strategic ballistic missile. A commonly used definition of a strategic ballistic missile, which the United States and Russia have already agreed upon, is a missile that has a range greater than 3,500 kilometers or a velocity in excess of 5 kilometers per second. If this definition were used, the United States and Russia would be free to develop and deploy a wide range of highly effective theater missile defense systems without having fundamentally altered the letter or intent of the ABM Treaty.

Even if we take this step, however, we will still be faced with a mid-term problem. U.S. territory will inevitably face new ballistic missile threats, which our theater missile defense systems are not being designed to counter. North Korea already has an ICBM program in development and other countries will almost certainly be able to exploit readily available technology in order to acquire such capabilities. The administration is simply not preparing adequately for this threat.

If the United States is to deal with this problem in an effective manner, the ABM Treaty will have to be altered to allow for the deployment of a robust national missile defense system. While we can begin immediately with the development of a national defense system that is in compliance with the ABM Treaty, eventually we will need relief from the treaty. This will be necessary in order to cover all Americans adequately and equally. Deployment of several ground-based missile defense sites, perhaps supplemented by enhanced mobile systems, could provide a limited, yet comprehensive defense of the United States. This could be achieved with relatively modest changes to the ABM Treaty, changes that would not undermine United States or Russian confidence in their deterrent forces.

But even if we accomplish this goal, we would still be left with a long-term problem having to do with the fundamental purpose of the ABM Treaty. Ultimately, if the United States and Russia are to establish normal relations and put the cold war behind them, they will have to do away with the doctrine of mutual assured destruction, which lies at the heart of the ABM Treaty. This can and should be a cooperative process, one that leads to a form of strategic stability more suited for the post-cold-war world. Such a form of stability might be called mutual assured security and should be based on a balance of strategic offensive forces and strategic defensive forces. We must once and for all do away with the notion that defense is destabilizing and that vulnerability equals deterrence.

If the United States and Russia are serious about reducing their strategic nuclear forces to levels much below those contained in the START II agreement, we must be able to fill the void with missile defenses. We can do this cooperatively with Russia and other concerned parties, but we must make it clear that the United States is intent on evolving away from an offense-only policy of deterrence. We will undoubtedly require strategic nuclear forces for the foreseeable future to deter a broad range of threats, but in a world of diverse and unpredictable threats, we can no longer rely on these exclusively.

Mr. President, I hope the administration will reconsider the range of problems I have discussed today. I believe that there are reasonable solutions within reach, if only we seek them. An incremental approach that deals with these problems in phases may facilitate cooperation and help wean both sides away from the comfortable yet outdated patterns of the cold war.

Mr. President, I yield the floor.

Mr. FRIST addressed the Chair.

The PRESIDING OFFICER. The Senator from Tennessee.

EXTENSION OF MORNING BUSINESS

Mr. FRIST. Mr. President, I ask unanimous consent for an extension of morning business for 10 minutes.

The PRESIDING OFFICER. Is there objection? Hearing none, it is so ordered.

LEGAL REFORM

Mr. FRIST. Mr. President, I rise today to discuss the need for legal reform in America. Our civil justice system is broken. The changes in our tort law system that were introduced 30 years ago had merit, but like many other aspects of our society, what began as a good idea has been the subject of ceaseless expansion and is now totally out of hand. We are now by far the most litigious country on Earth, and we are paying a huge price as the result.

Mr. President, I come to this issue from a different perspective than most of my colleagues. I am not a lawyer. I am a doctor. I have seen firsthand day in and day out what the threat of litigation has done to American medicine. I have watched my colleagues every day order diagnostic tests—CT scans, blood tests, MRI scans, electrocardiograms—that were many times costly and unnecessary for the good of the patient. They were ordered for one simple reason—to create a paper trail to protect them in the event a lawsuit would ever be filed. It is called defensive medicine, and it happens every day in every hospital throughout America. It alters the practice of medicine and drives the cost of health care higher and higher.

Mr. President, I have also treated patients who were injured by allegedly defective products or in automobile accidents, and I have watched as their families were contacted by lawyers, urging them to sue before anyone knew the real facts of the accident.

Mr. President, I know we will face stiff opposition, but changes must be made in our legal system. It is costing us billions of dollars each and every year and, perhaps more importantly, it is turning us into a nation of victims.

Our product liability laws are a particular area in need of reform. Our present system costs this Nation between $80 and $120 billion a year. A 1993 Brookings Institution survey found that pain and suffering awards alone cost American consumers $7 billion each year.

Mr. President, 50 to 70 percent of every dollar spent on products liability today is paid to lawyers.

What really is the problem? It is fashionable to talk about the big verdict cases, cases like the customer at McDonald's who spilled hot coffee in her lap, or the fleeing felon in New